United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 7, 1996

TO : Richard Ahearn, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Bach Temps, Inc. 512-5009-6700
Case 9-CA-33659

This case was submitted for advice on whether the second count of the Employer's state court lawsuit is baseless and unlawful under Bill Johnson's Restaurants.[1]

The Union engaged in a strike against Cook Family Foods (Cook) from November 1993 until April 1995. During that strike, the Region sought and obtained Section 10(j) injunctive relief against Union strike misconduct, and Cook also sought and obtained a temporary state court injunction against a pattern of Union violence and intimidation.

In June 1994, the Employer agreed to supply Cook with temporary employees and eventually began supplying around 15 employees per day. In September 1994, the Union published a handbill entitled "Notice to the Public" which read in part:

> [EMPLOYER] SUPPLYING SCAB WORKERS
> TO COOK FAMILY FOODS
>
> [The Employer]...is currently preying upon unemployed West Virginia workers by offering $5 per hour jobs to cross the picket lines...[The Employer] is misleading people by telling them that the strike is over or that most of the workers don't want a union (despite the 350 to 16 strike vote).

In November 1994, the Employer terminated its contract with Cook. Ten months later, in September 1995, the Employer filed a state court lawsuit against the Union seeking $3 million in compensatory and punitive damages.

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[1] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

The suit contained three separate counts. Count I, termed "Intentional Interference With Contractual Relationship" alleged that the union had engaged in violent conduct intended to frighten potential employees and interfere with the Employer's business with Cook. The Region has already concluded that this Count is not baseless and cannot be enjoined under Bill Johnson's Restaurants, and thus is not submitting it for advice. Count II, termed "Libel" alleges that the Union's handbill contained "false, malicious, scandalous, unprivileged and defamatory" words because it alleged that the Employer was attempting to replace striking workers. The Final Count III, termed "Outrageous Conduct", alleged that the Union had engaged in "extreme and outrageous conduct" by having engaged in the conduct of Counts I and II together with the conduct of picketing the Employer's corporate offices. The Region has already concluded that Count III also is not baseless and not enjoinable and is not submitting it for advice.

We conclude, in agreement with the Region, that Count II is baseless, filed with an unlawful retaliatory motive, and thus may be enjoined under Bill Johnson's Restaurants.

The Supreme Court held in Bill Johnson's, 461 U.S. at 743-44, 748-49, that the Board may not enjoin as an unfair labor practice the filing and prosecution of a lawsuit unless the lawsuit lacks a reasonable basis in fact or law and was commenced for a retaliatory motive. In evaluating whether a lawsuit lacks the requisite basis in fact, the Board must determine whether it raises "genuine issues of material fact" and, if so, the Board must stay its proceedings pending resolution of the lawsuit. 461 U.S. at 745-46. The Board may look beyond the pleadings in making such determinations, id. at 744-45; however it need not resolve credibility issues or factual disputes, id. at 746 n.12. The burden rests on the court plaintiff "to present the Board with evidence that shows his lawsuit raises genuine issues of material fact," and that there is prima facie evidence of each cause of action alleged. Id. If the Board is unable to conclude that the suit lacks a reasonable basis, it should "proceed no further with the . . . unfair labor practice proceedings but should stay those proceedings until the . . . court suit has been concluded." Id. at 746.

Evidence of retaliatory motive consists of such factors as the baselessness of the lawsuit,[2] a request for damages in excess of mere compensatory damages,[3] and prior animus towards the lawsuit defendant.[4] A retaliatory motive alone, however, is insufficient to warrant injunctive relief. 461 U.S. at 744. Consequently, the first step is to determine whether a suit possesses a "reasonable basis" in law or fact. Bill Johnson's Restaurants, Inc., 290 NLRB 29, 30 (1988) (on remand).

The analysis in Bill Johnson's does not apply, however, if a lawsuit is preempted by federal law or was filed with an objective that is illegal under federal law. Bill Johnson's, 461 U.S. at 737 n.5. Under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959), a lawsuit is preempted when the activities are "arguably subject" to the protections in Section 7 or "arguably prohibited" by Section 8. In such circumstances, the court "must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Id. at 245. The only exceptions to this doctrine are where the activity is of mere peripheral concern to the Act, or where the conduct touches "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the states of the power to act." Id.

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[2] Bill Johnson's, 461 U.S. at 747 (Board permitted to take into consideration court's determination that lawsuit not meritorious in deciding whether lawsuit retaliatory).

[3] See, e.g., Phoenix Newspapers, Inc., 294 NLRB 47, 48-50 (1989) (Board held that $10 million in punitive damages sought for tortuous interference with business relations and libel claims warranted finding that lawsuit retaliatory); see also H.W. Brass, Inc., 296 NLRB 1286, 1287 (1989) (lawsuit found to be retaliatory where employer could not support his damages claim with examples of lost profits or customers); LP Enterprises, 314 NLRB 580, 587 (1994).

[4] H.W. Brass, at 1287 (Board concluded that libel claim retaliatory where only possible explanation was retribution for union's picketing and defamation of company president).

at 243-44. An example of the latter is libel. See Linn v. Plant Guard Workers, 383 U.S. 53, 63-64 (1966).

The Employer's Count II alleges that the Union's handbill contained "false, malicious" words because the Employer in fact was not attempting to replace striking workers.[5] We conclude that Count II is baseless because the Union's conduct constituted privileged labor speech under the Act.[6]

The Act protects non-coercive employee communications with third parties to apprise them of the existence of a labor dispute and to enlist their support, so long as the communications are protected by the Act, Garmon and Linn, supra, and do not involve picketing of neutrals or coercive conduct intended to induce them to cease doing business with or working for the neutral employer.[7] Although the Employer alleges that the Union's handbill falsely and maliciously accused the Employer of replacing striking workers, it is apparent that the handbill was clearly limited to publicizing the Union's labor dispute and to calling the Employer's employees "scabs" because they were working behind the Union's picket line. This statement was literally true. In any event, such language either does not rise to the level of libel,[8] or is at a minimum a

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[5] The Employer argues that Cook regularly used temporary employees which were not unit employees. Therefore the Employer's supplying of temporary employees arguably was not a "replacing" of unit employee strikers.

[6] See, e.g., Linn v. Plant Guard Workers, supra.

[7] See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 583-84 (1988) (a neutral employer may be the subject of peaceful, truthful handbilling urging a consumer boycott -- so long as it is unaccompanied by violence, picketing, or patrolling); Denver Bldg. & Constr. Trades Council, 341 U.S. at 692 (Section 8(b)(4) has the dual objectives of "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own").

[8] See Letter Carriers v. Austin, 418 U.S. 264, 281-287 (1974) (describing employees as "scabs" found not malicious libel). Moreover, the Board has stated that there is a

protected expression of opinion - which cannot be knowingly false.[9] Since the Union's language therefore constituted protected labor speech, this Count is baseless as encompassing conduct protected by the Act.

We conclude in agreement with the Region that the lawsuit was retaliatory since it sought punitive damages and also was aimed at clearly protected activity. Therefore, the Region may now issue complaint and attack this Count II as retaliatory and baseless as attacking protected labor speech.[10]

"fine line between raising highly sensitive issues that relate to terms and conditions of employment and those that relate to disparaging an employer's reputation." San Juan Hotel Corp., 289 NLRB 1453 (1988) (finding union communications regarding hotel trustee protected labor speech where referenced labor dispute, and that description of trustee as a "Dictator" and "Robin Hood" constituted "obvious rhetorical hyperbole"); see also SEIU, (Delta Air Lines, Inc.), 293 NLRB 602, 603 (1989) (lawful for airline maintenance employees to publish airline safety statistics in context of labor dispute); Seattle Seahawks, 292 NLRB 899, 900 (1989) (Board held that union's comment that team played injured players was protected speech, even if it was exaggerated and "not soundly based"); Allied Aviation Serv. Co., 248 NLRB 229, 231 (1980) (airline mechanics' public letters questioning safety of airlines constituted protected speech where related to employees' protest).

[9] See, e.g., Boxtree Restaurant & Hotel, Case 2-CA-27912, Advice Memorandum dated March 20, 1995 (concluding that accusations that the Employer violated various labor laws and building codes constituted mere opinions that could not be "knowingly false"); Parc Fifty Five, Case 20-CA-24210, Advice Memorandum dated February 28, 1992 (lawsuit attacking union assertion that employer had "broken federal laws" deemed merely opinion, not fact, and therefore not "knowingly false").

[10] Counts I and III were not submitted for advice. We note, however, that although Count I is not baseless, it is not clear on what grounds the Region finds that Count III is not baseless.

Finally, we conclude that Count II is preempted once complaint issues. In Loehmann's Plaza,[11] the Board held that once a complaint issues alleging violations involving arguably protected activity, any court lawsuit concerning the question is preempted and the continued pursuit of such a lawsuit violates Section 8(a)(1). The Employer therefore has an affirmative duty to take action to stay the court proceedings on Count II within seven days following issuance of the Board complaint.[12]

B.J.K.

[11] 305 NLRB 663, 670 (1991).
[12] Id. at 671.